Date Mailed
May 8, 2002

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Investigation Into Ameritech Wisconsin's Unbundled Network Elements	6720-TI-161

ORDER DENYING PETITION FOR REHEARING AND RECONSIDERATION

On April 11, 2002, a competitive local exchange provider (CLEC) coalition filed a Petition for Rehearing and Reconsideration (Petition) in the above-captioned docket. Ameritech filed a Response to the Petition on April 18, 2002. WIS. STAT. §§ 196.39 and 227.49, and WIS. ADMIN. CODE ch. PSC 2 allow an interested party to petition for rehearing or the reopening of a case, and allow the Commission to grant a rehearing if there is a material error of law or fact, or a discovery of strong new evidence that could not have been previously discovered with due diligence. WIS. STAT. § 227.49 allows the Commission to order a rehearing or enter an order with reference to the petition without a hearing, and provides that, if the Commission does not dispose of a petition within 30 days after it is filed, the petition is deemed denied. The 30-day period for this petition ends May 13, 2002.

The CLECs allege that the Final Decision in this docket contains a material error of law making the order unlawful, unreasonable, improper or unfair. The alleged error is that the Commission failed to perceive the full extent of its discretion and so failed to properly exercise its discretion to order unrestricted tariffing of unbundled network elements (UNEs) or tariff availability for CLECs with existing interconnection agreements. The CLECs argue that the Commission relied on federal district court decisions without recognizing that it is not bound by

these decisions and that the decisions are fundamentally flawed. They allege that there is no indication in the Final Decision that the Commission considered making the rates that result from the methodology established in this case available to CLECs with existing interconnection agreements. By way of remedy, the CLECs ask that the Commission: eliminate the requirement that in order to buy off the tariffs, the CLEC must have begun the §§ 251/252 process; allow all CLECs (or at least those with existing interconnection agreements) to buy off the tariffs; and clarify that CLECs invoking 47 U.S.C. § 251(i) to opt-into another carrier's interconnection agreement can purchase under the time-limited tariffs until the opt-in process is complete.

The Commission is fully aware that the Michigan and Oregon court cases[1] cited in the Final Decision are not binding in this jurisdiction. The Final Decision does not imply that the Commission concluded that it was bound by prior precedent, but only that it came to the same conclusion as those courts–that allowing utilities to bypass the §§ 251/252 process violates the Act.

The CLECs cite case law stating that discretion is "more than a choice between alternatives without giving the rationale or reason behind the choice."[2] They allege that there is no indication in the Final Decision that the Commission considered making the rates that result from the methodology established in this case available to CLECs with existing interconnection agreements. However, the issue the Commission was addressing was how to make the results of this docket available for arbitrations and whether it could require tariffing. The Commission made the decision that generalized comprehensive tariffs violate the Act, but time-limited tariffs

[1] Verizon North v. Michigan PSC, 140 F. Supp.2d 803 (D. Mich. 2000); MCI v. GTE, 41 F. Supp.2d 1157 (D. Ore. 1999).
[2] Joint CLEC Petition for Rehearing and Reconsideration in docket 6720-TI-161, April 11, 2002, pg. 3, citing Hacker v. DHSS, 197 Wis. 2d 441 (1995).

available to carriers that have begun the §§ 251/252 process do not. The Commission fully explained its reasoning process in reaching this conclusion. Such a discussion need not be so detailed or intricate as an appellate court's opinion, nor does the agency need to provide a detailed analysis of why it rejected every other possible conclusion at which it might have arrived.[3] If the Commission were required to do so, it would have to address every possible permutation that might arise. The Commission explained why it followed the pathway it did to reach the decision that it did. The Commission does not have to explain why it did not accept other pathways.

Additionally, there is evidence that the Commission was aware of and considered the issue of existing interconnection agreements. The Final Decision states, "To the extent that existing interconnection agreements between Ameritech and competitors have change of law provisions, the Commission views this Final Decision as establishing a change of law."[4] The Telecommunications Division submitted a March 1, 2002, memorandum to the Commission with the Draft Final Decision in this docket. That memorandum states:

> The CLECs argue that the results of this docket should be available to all interconnection agreements retroactive to the effective date of this order. However, it is doubtful whether the Commission has the authority to unilaterally alter the terms of an existing contract between private parties. Other alternatives would be to require that, as part of the order, the results of this docket be applied to all agreements with provisions stating that changes of law apply to the agreement.

For the reasons stated above the Commission finds that there is no material error of law and denies the Petition for Rehearing and Reconsideration. However, based in part on the

[3] See Brookfield v. Milwaukee Sewerage District, 141 Wis. 2d 10 (Ct. App. 1987); Galang v. Medical Examining Board, 168 Wis. 2d 695 (Ct. App. 1992); and State ex rel. Harris v. Annuity and Pension Board, 87 Wis. 2d 646 (1979).
[4] Final Decision, p. 190.

questions raised and the request for clarification in the Petition, the Commission determines that, given the extremely complex nature of this docket, it would be useful to expand on the Final Decision and provide supplemental explanation to add clarity.

In their Petition, the CLECs argue that the Michigan and Oregon cases were wrongly decided and that state laws requiring unrestricted tariffing of UNEs are not preempted under federal law. However, the Commission made no finding about preemption. What the Commission did say was that the Act includes various provisions that preserve a state's ability to promote competition through state laws, but these provisions specify that state efforts must be consistent with the Act.[5] As discussed in the Final Decision, a state commission decision that requires unrestricted tariffing of all UNE prices is not consistent with the Act; it substantially prevents implementation of the federally established method of promoting competition by allowing carriers to "buy off the rack" rather than using the §§ 251/252 process.

The CLECs raise a Tenth Circuit Court of Appeals case[6] that they feel supports their conclusion that a party to any existing interconnection agreement should be able to buy off the tariff regardless of the prices in the agreement. However this Washington case, which is also not binding on this Commission, involved the question of whether a state can include a clause in an interconnection agreement to allow the requesting carrier to opt for tariffed rates rather than the specific rates in the interconnection agreement.[7] It does not support the CLECs' broader position that parties to all existing agreements, whether or not they include such clauses, should be able to

[5] *See for example*: 47 U.S.C. §§ 251(d)(3), 261(b) and 261(c).
[6] U.S. West Communications, Inc. v. Sprint Communications Company, L.P., 275 F.3d 1241 (10th Cir. 2002). (Washington Case.)
[7] The court specifies that the question of filing tariffs was not part of the case. (n.4 at p. 1245) No tariffing requirement was challenged.

buy off the tariffs. The question of whether an agreement can have a clause allowing the CLEC to buy off tariffs is discussed later in this order.

The CLECs also discuss a 1997 FCC order involving a Texas statute.[8] Again, the case is not on point. It does not discuss UNE tariffing, but involves a Texas statute that allowed carriers to buy for resale at a rate that was 5% less than the retail tariffs for that service and allowed ILECs to agree to rates lower than that. The question for the FCC was whether this statute was inconsistent with the Act's pricing standards for wholesale rates. The FCC found that the Act did not preempt this pre-Act Texas statute because it provided a "parallel track" for carriers wanting to buy for resale and did not prevent carriers from utilizing the negotiation and arbitration procedures in §§ 251/252.

While comparisons may be drawn, the situation in this docket is quite different. The FCC stated that the Texas statute created a ceiling price and that CLECs still had incentive to begin the §§ 251/252 process to get lower prices. The FCC was careful to point out that the arbitration panels in Texas had awarded discounts such as 21.6% and 22.99%, significant changes from the statutory ceiling which used a 5% discount. The 5% figure was statewide and generic; it did not consider the circumstances of any particular company, as the Texas arbitrations did. This docket did look at the specific circumstances of a particular company when determining the methodology to be applied when determining UNE rates. Further, the rates determined by applying this methodology do not function as a ceiling. The Order provides guidelines to arbitration panels concerning the methodology for determining rates. Application of that methodology results in a set rate, not a ceiling. While panels can make changes to the

[8] Petition for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, 13 FCC Rcd 3460, FCC 97-36 (released October 1, 1997). (Texas Order.)

methodology based on the facts and circumstances in a particular arbitration, price differences as dramatic as those between the Texas statutory figure and the Texas arbitration awards would seem unlikely between tariffed rates and arbitration awards here. This could significantly lessen the incentive to pursue the negotiation and arbitration process in an attempt to obtain lower rates, an incentive dampener not present in the Texas case.

The Supreme Court and the FCC have described the three ways that a carrier can obtain access to an ILEC's network under the Act: leasing UNEs through an agreement between the carriers, resale at wholesale rates, and interconnection using its own facilities.[9] Under the Texas statute the requesting carrier's access to the ILEC's network took the same form as under the Act, resale by obtaining services at rates reduced from the retail tariff rates. The question was about the appropriate way to price that form of access, what the rate reductions would be. Unrestricted tariffing is not a track running parallel to a form of interconnection or access already in the Act, but a track going around those forms and establishing a new one: access through unrestricted tariffs.

Interconnection agreements can be negotiated or arbitrated. Among other possibilities they can involve opting-into provisions from other interconnection agreements or can contain rates specific to that agreement. There is nothing to prevent parties that are developing an interconnection agreement from agreeing to use the rates that result from the methodology established in this case. Further, this case sets guidelines for use by arbitration panels. Therefore, these rates are available to CLECs as part of negotiated interconnection agreements as well as through arbitrations.

[9] Washington Case, p. 1244; Texas Order par. 2.

They are also available to CLECs while the §§ 251/252 process is underway. One way they are available during this time is through the time-limited tariffs approved as part of this docket. Another way they are available during this time is through 47 U.S.C. § 252(i), which allows a requesting carrier to "pick and choose" provisions from other interconnection agreements. A CLEC opting-into the terms of an existing agreement under § 252(i) is participating in the §§ 251/252 process. As a result, the time-limited tariffs ordered in this case are available to a CLEC while the opt-in process is underway.

The Commission cannot, however, unilaterally alter the terms of existing interconnection agreements. These are contracts between the parties to the agreement. If an existing interconnection agreement allows the requesting carrier to opt-into the rates that result from the methodology established in this case, or to request an amendment to the agreement in order to adopt those rates, they are free to do so. This does not depend on unrestricted tariffing of these rates. If the interconnection agreement does not have such a provision, the Commission cannot unilaterally alter the terms of the existing contract between carriers and allow or require use of these rates.

Similarly, some existing interconnection agreements provide that a "change of law" will be automatically adopted into the interconnection agreement, or that either party may request that it be adopted. The Final Decision in this case clearly states that it is viewed as establishing a "change of law." As such, the decision triggers "change of law" provisions. However, if an existing interconnection agreement does not contain such a "change of law" provision, the Commission, again, cannot unilaterally alter the terms of the contract between the carriers. Once

a carrier has entered an interconnection agreement, the terms of that agreement control until it expires.

As stated earlier, the Commission determined that providing this supplemental discussion will provide additional clarity in this extremely complex case. This discussion merely expands on the decisions already made in the Final Order and must be read in concert therewith.

Dated at Madison, Wisconsin, _____

By the Commission:

_____
Lynda L. Dorr
Secretary to the Commission

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See attached Notice of Appeal Rights

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in Wis. Stat. § 227.53. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in Wis. Stat. § 227.01(3), a person aggrieved by the order has the further right to file one petition for rehearing as provided in Wis. Stat. § 227.49. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 9/28/98

Appendix A

In order to comply with Wis. Stat. § 227.47, the following parties who appeared before the agency are considered parties for purposes of review under Wis. Stat. § 227.53.

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